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No. 94-820

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed November 7, 1994
Certiorari Granted January 13, 1995

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* The three items identified by the asterisk were not included in the record submitted by the Benefits Review Board to the United States Court of Appeals for the Ninth Circuit. They comprise the pleadings submitted to and conclusions reached by the Department of Labor's Office of Workers' Compensation Programs. Petitioner and Respondent Rambo did not agree that each item should be included in the Joint Appendix. The Clerk suggested inclusion, accompanied by this explanation.

CHRONOLOGY OF EVENTS

November 28, 1983	Decision and Order Awarding Benefits Issued
October 30, 1989	Employer's Application for Modification Filed
December 8, 1989	Administrative Response to Modification Issued
May 29, 1991	Decision and Order Granting Modification Issued
November 9, 1992	Decision and Order of Benefits Review Board Affirming Modification Issued
June 24, 1994	Opinion of the United States Court of Appeals for the Ninth Circuit Reversing Modification Issued
August 10, 1994	Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing Issued
November 7, 1994	Petition for Writ of Certiorari Filed
January 13, 1995	Petition for Writ of Certiorari Granted

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
211 Main Street – Suite 600
San Francisco, California 94105

Case No. 83-LHC-242

OWCP No. 18-6945

IN THE MATTER OF JOHN RAMBO, CLAIMANT

v.

METROPOLITAN STEVEDORE COMPANY
SELF-INSURED EMPLOYER

Before: JAMES J. BUTLER, Administrative Law Judge.

DECISION AND ORDER – AWARDING BENEFITS

I. *Statement of the Case*

A. Pertinent statutes and regulations.

The instant claim was made under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, hereinafter referred to as "the Act," and the regulations implementing the Act contained in Title 20, Code of Federal Regulations (C.F.R.), Parts 701 and 702. All code section references are to 33 U.S.C.A. (1970 ed. and Supp. V, 1975) unless otherwise indicated.

B. Stipulations.

The parties have stipulated as follows (29 C.F.R. § 18.51):

1. The employer and employee on all occasions herein were covered by the provisions of the Act. The employee had both an appropriate situs and status on the occasion of these events and the employer is a maritime employer.

2. The claimant, John Rambo, born April 11, 1945, bearing Social Security No. 547-64-2169, was employed as a longshoreman (frontman) by Metropolitan on September 9, 1980, on which occasion he sustained an injury arising out of and occurring in the course of his employment to his back and leg.

3. On the occasion of said injury, the employee's average weekly wages were $534.38 per week which the parties stipulate for all purposes was sufficient to produce a compensation rate of $356.26 per week for temporary total disability.

4. That the first lost time from work occurred September 10, 1980, and the employee was paid temporary total disability at the weekly rate of $356.26 per week for the period September 10, 1980 through and including November 22, 1981, in the total sum of $22,342.58, which sum fully satisfied all claims of temporary total disability.

5. That the employee's condition became permanent and stationary November 16, 1981, as indicated by Jack Paschall, Jr., M.D., as a result of an examination of November 16, 1981, outlined in a report dated November 30, 1981. That the date of November 16, 1981, is the

appropriate date for the commencement of any permanent partial disability payments as are to be made herein.

6. That the employee sustained an overall current permanent partial disability equivalent to 22½% of the whole person which the parties recognize as an "economic disability" producing a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability.

7. The parties stipulate that all appropriate forms and notices were timely and properly filed including a timely controversion consistent with the positions of the parties and there is no basis for and no claim for penalties and/or interest in these proceedings.

8. That the claimant's attorney has rendered services both at the informal level and the formal level some of which directly relate to representation of the claimant wherein no controversion existed and some of which arise out of the dispute between the claimant and the employer. That in consideration of the documented time schedule and division of the services herein provided by claimant's attorney, claimant's attorney is entitled to separate fees from the claimant and the employer as follows:

a. As a lien on the employee's compensation, $1,000.00

b. Payable by the employer over and above the compensation otherwise called for herein the sum of $2,000.00 which sum fully satisfies all claims of fees for all purposes against this employer.

9. That all medical treatment has been provided by the employer herein and there are no claims for medical

costs and/or related items outstanding. Any incidental billings as may remain will be adjusted by the parties between them for a full resolution of such items.

10. That the claimant is entitled to permanent partial disability based on the compensation rate equivalent to his stipulated wage loss or $80.16 per week commencing November 16, 1981, and continuing thereafter (subject to the employer's seeking Special Fund relief and all other provisions of the Act) with said payments to continue indefinitely less a lump sum payment of $1,000.00 for the attorney fees referred hereinabove.

11. That these Stipulations resolve all issues between the parties and the parties respectfully request Award issue in accordance therewith subject to the limitations of the Act.

II. *Findings and Conclusions – §908(f)*

The evidentiary hearing in this matter was directed toward issues of fact pertaining to the requirements of § 908(f) of the Act. An explanation of the intent and purposes of this section is no longer necessary. The claimant is not directly concerned and the employer is well acquainted with its provisions. It should suffice to say only that this employer is clearly qualified for the statutory relief it seeks by virtue of claimant's documented pre-existing disability attributable to previous low back injuries and the permanent residuals of those events (see, in particular, Joint Exhibits 1 & 2). The whole record presented fully supports employer position that it is eligible for a limitation of its liability under the circumstances

brought forward. The claimant's permanent partial disability is materially and substantially greater than that which would have resulted from the subsequent subject injury alone. Accordingly, the employer shall provide compensation for one hundred and four weeks only. After payment of the one hundred and four week period, the claimant shall be paid the remainder of the compensation due him out of the Special Fund established for this and other purposes in § 944 of the Act. The employer shall, however, continue to provide the medical benefits required by § 907 of the Act.

ORDER

The parties hereto, now including the Director, OWCP, on account of the liability of the Special Fund, shall proceed in a manner consistent herewith and the terms and provisions of the Act and applicable regulations.

/s/ James J. Butler
JAMES J. BUTLER
Administrative Law Judge

Dated: Nov. 28, 1983
San Francisco, California

JJB:scm

LAW OFFICES JAMES J. WOOD
3441 East Broadway
Long Beach, California 90803
Telephone: 213-434-5703
Attorney for Employer

UNITED STATES DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMPENSATION PROGRAMS

JOHN D. RAMBO, Claimant, vs. METROPOLITAN STEVEDORE COMPANY, PERMISSIBLY SELF-INSURED, Employer.	CASE NO: 18-6945 (83-LHC-242) EMPLOYER'S APPLICATION FOR MODIFICATION §922

COMES NOW the employer by this Application to modify the previous Compensation Order of the Department of Labor filed December 6, 1983.

STATISTICAL DATA

Claimant: John D. Rambo

Injury Date: September 9, 1980

Birth Date: April 11, 1945

Social Security No: 547-64-2169

Employer No: C8000144

Pre-Injury Wage: $534.38

Benefit Rate: $356.26

Wage Loss: $124.24 per week

Benefit Rate: $80.16

Special Fund Started: December 1, 1983

STATEMENT OF FACT

This matter came on before an Administrative Law Judge who issued a decision which was converted into a Compensation Order by the Department of Labor filed December 6, 1983. That Compensation Order provided that the claimant, as a result of the injury herein, sustained a weekly wage loss of $120.24 per week providing for a compensation rate of $80.16 per week. The employer paid the first 104 weeks and the claimant has been getting paid by the Special Fund in the interim.

The employee's current earnings are documented by Pacific Maritime Association records, enclosed herein as Exhibit B. Exhibit A represents the calculations for the period covering the week ending March 12, 1988 through the week ending March 4, 1989. This 52 week period demonstrates that the employee earned $78,271.05 for an average weekly wage of $1,505.21. This is almost 300% of the employee's pre-injury average weekly wage demonstrating that he is not entitled to a wage loss of any kind at this time and that he has no economic disability as a result of this injury.

APPLICATION FOR MODIFICATION

The employer respectfully requests that all compensation payments being made through the Special Fund be terminated immediately. There is prima facie evidence presented here to demonstrate that this employee does

not have a wage loss now and he has not had a wage loss for the last year or two.

It is requested that an interim Stay Order issue, terminating the benefits temporarily while the claimant responds to this Application for Modification. In the absence of good cause being demonstrated to the contrary, it is requested that the Department of Labor issue a new Compensation Order completely terminating the previous Compensation Order and providing for the discontinuance of all payments pursuant to §922 of the Act.

CONCLUSION

The Department of Labor has indicated in the past that they are not inclined to issue Stay Orders or to issue Compensation Orders terminating previous Compensation Orders. In the absence of any affirmative action by the United States Department of Labor, the matter will normally sit dormant while payments are continuing to be made on an improper basis. Failure of the Department of Labor to act in accordance with the provisions of the Longshore and Harbor Workers' Compensation Act may cause the employer to seek adjustment in all Special Fund assessments for monies paid beyond the time when the employer submitted its Application for Modification. The employer would contend in that instance that a Stay Order and/or an Order terminating the benefits should have issued and assessments made against the employer for monies paid beyond that date are improper since the payments should not have been made.

In this case we can clearly show simply by the earnings information alone that for the time frame between the issuance of the previous Compensation Order and the

present earnings of the claimant there can be no reasonable argument made suggesting that pay increases in the interim would be an adequate explanation for the increase. There is no basis whatever for the pay increases to support a 300% increase in earnings as is demonstrated by the information provided.

WHEREFORE, employer respectfully requests that a Stay Order issue immediately. Thereafter, if the claimant failed to show good cause why a Compensation Order terminating benefits should not issue, then an Order terminating benefits should issue relieving the Special Fund of further liability and relieving the employer of any potential assessments for monies paid by the Special Fund in this case. Lastly, if the Department of Labor either refuses to act upon this Application for Modification or alternatively if it considers itself to be powerless to act for any reason, it is then requested that the matter be referred promptly to the Office of Administrative Law Judges. An LS-18 is enclosed for that purpose.

We want to emphasize that conferences before the Department of Labor will serve no purpose. If the Department takes the position that it has no power to act in any way to modify the previous Compensation Order, then it is apparent that the parties appearing before the Department of Labor at a conference will simply delay matters without any hope of productive result following that delay.

Respectfully submitted,

/s/ James J. Wood
JAMES J. WOOD, Attorney for the Employer

MAGANA, CATHCART, McCARTHY & PIERRY
301 North Avalon Boulevard
Wilmington, California 90744
834-2691 or 775-8348

UNITED STATES DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMPENSATION PROGRAMS

JOHN RAMBO,

Claimant,

-vs

METROPOLITAN STEVEDORE; SELF-INSURED,

Defendants.

_____/

CASE NO.: 18-6945

(83-LHC-242)

CLAIMANT'S PRELIMINARY RESPONSE TO APPLICATION FOR MODIFICATION OF AWARD PURSUANT TO SECTION 922

I. BACKGROUND

On October 30, 1989, the employer filed an Application for Modification of a Compensation Order which had been entered on November 28, 1983. In that Application, the employer not only seeks Modification of the prior Compensation Order, but essentially asks for such Modification on a summary basis. Without citing authority, the employer asks the Department of Labor to strike the Order without permitting the claimant an opportunity to be heard and/or submit evidence or argument.

II. ISSUES

1) Should the Department either vitiate the prior compensation order or issue an Order terminating benefits on the basis of the Application filed on October 30, 1989?

Employer's counsel concedes in its Application that it is not the Department's policy to summarily adjudicate Petitions for Modification of Awards. Furthermore, the employer cites no authority which would authorize such an extraordinary remedy. It is respectfully submitted that the employers "modest proposal" is absurd and should be denied.

2) Should this Application for Modification of Award proceed in an orderly fashion, first to Informal Conference?

The employer argues that it will be prejudiced unless this matter is brought to a Hearing before an Administrative Law Judge yesterday. The reason that the employer apparently feels it will be prejudiced is that the law and the facts of the case are so patently clear that only one decision could possibly be rendered on the Application for Modification. Again, the employer cites no authority.

Given the employer's one sided and apparently preliminary evaluation of the factual and medical issues involved in this Modification of a prior Compensation Order, it is apparent why the employer wishes to rush to judgment. Modification pursuant to Section 922 of the Longshore and Harbor Workers' Compensation Act is not nearly as simple as is alleged by counsel for the employer.

In *Fleetwood vs. Newport News Shipping*, 18 BRBS 12 (CTR) (4th Cir. 1985) both the majority and dissent review the issues involved in a Modification of an Award.

In this case both the majority opinion and the dissent agreed that an award of compensation might only be modified by showing a substantial change in overall wage earning capacity. It should be noted that this is the only thing that the majority and the dissenting opinion agreed upon.

The dissenting opinion concluded that as a predicate to modifying an award there must be a change in the physical condition of the claimant. The dissent relied upon fifty years of prior court decisions, including a 9th Circuit Court of Appeal Decision. That decision is *McCormick Steamship Company vs. U.S. Employees Compensation Commission*, 62 F. 2d 84 (9th Cir. 1933).

While the majority never specifically ruled that a change in physical condition is not a condition precedent to modifying a prior award, it holds that one of the factors to be considered in determining whether there has been a change in wage earning capacity will be the actual post-award earnings of the claimant. Whether or not this court considered the impact of its ruling on the overall policy of the Act to encourage rehabilitation is nowhere reported.

Regardless of whether the Ninth Circuit, *McCormick* approach which requires as a condition precedent to a modification, a substantial change in physical condition; or, whether one of the factors to be considered in a modification proceeding will be post award earnings, it is

clear that the mere assertion of increase earnings is not dispositive of a Section 922 proceeding.

It is respectfully submitted that before this award is modified claimant is entitled to a hearing on the issues presented.

III. CLAIMANT'S CONTENTIONS

1) Claimant contends that as a precedent to modifying a Compensation Order, medical evidence must be submitted to showing that there has been a change in the employee's physical condition which has affected his earning capacity;

2) Claimant contends that his physical condition has deteriorated since the Award;

3) Claimant contends that the economic situation on the waterfront has changed since his award. It is this change which has caused an increase in his earnings not an increase in his earning capacity;

4) Claimant contends that his actual post-award earnings would be substantially higher due to increased economic opportunity had it not been for the injury which forms the basis of his compensation award;

5) Claimant contends that it will present both medical and economic evidence to support his contention that there has been no change in claimant's wage earning capacity since the date of the award. If anything claimant has been deprived of the opportunity to earn greater wages because of this injury.

THEREFORE, it is respectfully requested that the employer's Application for Modification of Compensation Award be denied.

Respectfully submitted,

MAGANA, CATHCART, McCARTHY
& PIERRY

By: /s/ Thomas Pierry
THOMAS J. PIERRY

U.S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation Programs

MEMORANDUM OF INFORMAL CONFERENCE
(Under the Longshoremen's and Harbor Workers' Compensation Act, as extended)

1. Claimant
John D. Rambo

2. OWCP #
18-06945

3. Employer
Metropolitan Stevedore Co.

4. Carrier/Employers No:

5. Insurance Carrier
Self Insured

6. Date of Conference
(month, day, year
11-29-89

7. Date of Injury
(month, day, year)
9/9/80

8. Appearance:
X Claimant present

_ Claimant not present

For Claimant:
Thomas J. Pierry, Esq.

For Employer/Carrier
James Wood, Esq.

Issues:

a. Section 922 Modification

9. The claimant sustained/alleges an accidental injury on the date in item 7 while working for the above-named employer, under the circumstances bringing the injury within the purview of the LHWC Act (33 U.S.C. 901 etc seq.) or an extension thereof, resulting in the following injury(ies): to the low back.

10. Prior ALJ hearing was held and a Decision and Order was issued on 11/28/83. The employer/carrier have paid compensation for this injury in the amount of $30,517.61 for the following periods: 9/10/80 to 11/30/83 and the special fund has paid permanent partial disability since 12/1/83.

11. Present Claim:

A. THERE HAS BEEN NO CHANGE IN THE CLAIMANT'S PHYSICAL CONDITION AS DEMONSTRATED BY MEDICAL EVIDENCE.

B. THE MEDICAL STATUS HAS IN FACT DETERIORATED.

C. THE ECONOMIC CONDITIONS HAVE CHANGED. THE CLAIMANT IS WORKING UNDER CONTRACT AND IS GUARANTEED 45 HOURS PER WEEK.

D. THE CLAIMANT WOULD BE EARNING SUBSTANTIALLY MORE IF IT WERE NOT FOR THE INJURY.

12. Employer/Carrier's Position:

A. THE CLAIMANT IS EARNING 300% OVER THE 1983 AVERAGE WEEKLY WAGE. WAGE INCREASES DO NOT ACCOUNT FOR THIS SUBSTANTIAL INCREASE. THE D&O OF 11/28/83 SHOULD BE VACATED. THE CLAIMANT IS NOT ENTITLED TO ADDITIONAL WAGE LOSS BENEFITS.

13. Average weekly wage (Sec.10) $534.48
    X As stipulated by parties
    _ As recommended by Examiner

14. Compensation rate (2/3 x AWW) $356.28

15. Claimant
    X Returned to work on
    _ Has not returned to work
    _ Did not lose time

16. Medical costs related to the injury
    X have been paid by the employer
    _ Have not been paid

Upon discussion of the issues involved among those present, together with due consideration to all information in the administrative file, the following recommendation is made.

RECOMMENDATION

IN *FLEETWOOD V. NEWPORT NEWS SHIPBUILDING & DRY DOCK CO.*, 16 BRBS 282 (1984), AFF'D 776.F.2d 1225, 18 BRBS 12 (CRT) (4TH CIR. 1985), THE BOARD HELD THAT EMPLOYER SHOULD NO LONGER HAVE TO COMPENSATE CLAIMANT WHEN THERE HAS BEEN A CHANGE IN CLAIMANT'S ECONOMIC CONDITION SO THAT THERE IS NO LONGER A LOSS IN WAGE-EARNINGS CAPACITY. ASSUMING A 5% PER YEAR INCREASE IN WAGES SINCE 1983, BASED ON THE AVERAGE WEEKLY WAGE THE CLAIMANT WOULD NOW BE EARNING $43,000 PER YEAR. MR. RAMBO HAS REPORTED THE FOLLOWING EARNINGS: 1984 $58,000; 1985 $71,000; 1986 $72,000; 1987 $68,000; 1988 $76,000. CLAIMANT NO LONGER HAS ANY WAGE LOSS. I RECOMMEND THAT THE PRIOR D&O OF 11/28/89 BE VACATED.

A DEMAND HAS BEEN MADE AND THE CARRIER IS CONSIDERING THIS DEMAND.

SUBSEQUENT TO THE CONFERENCE MR. PIERRY REQUESTED THAT THE ISSUE OF STANDING TO PURSUE A MODIFICATION BE ADDED. UNDER SECTION 22 AN EMPLOYER/CARRIER WHO HAS BEEN AWARDED SPECIAL FUND RELIEF IS SPECIFICALLY INCLUDED AS A PARTY IN INTEREST.

PLEASE ADVISE OF THE ACCEPTANCE OR REJECTION OF THESE RECOMMENDATIONS WITHIN 14 DAYS. THE CASE IS IN POSTURE FOR REFERRAL TO THE OALJ FOR A FORMAL HEARING.

ACTION BY EMPLOYER/CARRIER

The self-insured employer or insurance carrier is to submit Forms LS-206 or LS-208, showing compliance with the above recommendation. Upon completion of payments, a final Form LS-208 is to be submitted.

In the event of controversion, Form LS-207 is to be submitted.

To avoid statutory penalties all required forms should be sent to this office promptly and within the time requirements of the Act.

/s/ Raquel Torres
for
Edward B. Bounds
Claims Examiner

12/8/89
(Date this memorandum issued)

UNITED STATES DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:	)	
JOHN RAMBO,	)	
Claimant,	)	Case No. 83-LHC-242
vs.	)	OWCP No. 18-6945
METROPOLITAN STEVEDORE COMPANY, Self-Administered,	)	
Employer.	)	

[p. 3] PROCEEDINGS

JUDGE STEWART: This is a hearing involving a claim for compensation under the Longshore and Harbor Workers' Compensation Act. The hearing is being held in San Pedro, California, at 2:25 p.m., on October 15, 1990.

The case number is 83-LHC-242 and the OWCP number is 18-6945. This hearing is being held pursuant to the notice of hearing dated July 12, 1990.

The case has been assigned to myself, Daniel L. Stewart, to hold the hearing and to decide the case.

Will counsel for Claimant please identify himself for the record and state his name, address, and telephone number.

MR. PIERRY: Thomas James Pierry, 301 North Avalon Boulevard, Wilmington, California, 90744, (213) 834-2691.

JUDGE STEWART: Will counsel for the Employer please identify himself for the record and state his name, address, and telephone number.

MR. WOOD: James J. Wood, attorney, 3441 East Broadway, Long Beach, California, 90803, (213) 434-5703.

JUDGE STEWART: Any decision made in this case will be based solely on the record made here this afternoon. Any papers, documents, or exhibits previously submitted to or filed are not a part of the record as of this time.

[p. 4] Anyone wishing any such paper document or exhibit to become part of the evidence in this case will have to introduce it at the hearing here this afternoon.

I would prefer that all exhibits that are introduced into evidence at the hearing here this afternoon be given to the court reporter. I understand that is the procedure that you do follow here in this area, and that is the procedure which I want to follow here this afternoon.

Counsel will now be allowed an opportunity to make a brief opening statement if they so desire.

Mr. Pierry.

MR. PIERRY: Yes, Your Honor.

OPENING STATEMENT

MR. PIERRY: The trial brief that I have submitted lays out what the Claimant's position is. But for the record, so there is no misunderstanding and there is no opportunity at a later time for a court to interpret the Claimant having waived any objections to this hearing or the introduction of evidence, let me briefly summarize my trial brief.

Your Honor, may I incorporate my trial brief into the record at this point?

JUDGE STEWART: Okay. That will be fine.

MR. PIERRY: It will be Claimant's, then, first in order.

[p. 5] JUDGE STEWART: Okay.

(The document referred to was marked as Claimant's Exhibit No. 1 for identification and received into evidence.)

MR. PIERRY: Essentially, the Claimant requests the Court to dismiss these proceedings –

JUDGE STEWART: I take it you have no objection, Mr. Wood, do you?

MR. WOOD: To his trial brief?

JUDGE STEWART: Yes.

MR. WOOD: No, Your Honor. I have one of my own, plus exhibits.

JUDGE STEWART: Okay. Fine. Go ahead.

MR. PIERRY: The Claimant requests the Court to terminate these proceedings and issue an order discussing these proceedings on essentially two grounds.

In 1983, the parties appeared before Judge William Butler and settled this case. As the order that came out in early 1983 demonstrates, the parties stipulated in open court to all issues between Metropolitan Stevedore and the Claimant.

The exact language of the order that followed was in No. 6, where the parties have stipulated as follows, pursuant to 29 C.F.R. Section 18.51, No. 6:

[p. 6] "That the Employee sustained an overall – permanent partial disability equivalent to 22 1/2 percent of the whole person, which the parties recognize is an economic disability producing a weekly wage loss of $120.24 per week, with an equivalent compensation rate of $80.16 per week for permanent partial disability."

Then, Item No. 11:

"These stipulations resolve all issues between the parties, and the parties respectfully request that an award issue in accordance therewith, subject to the limitations of the Act."

The only issue that was submitted to Judge Butler was the issue of 8(f) relief for the Employer. On November 28, 1983, he issued an order granting the Employer's petition for 8(f) relief and memorializing the settlement between the parties.

The Employer, on October 30, 1989, filed a document entitled, "Employer's Application for Modification, Section 922."

I have cited the cases which basically hold that stipulations made by parties are binding upon parties who make them and that they cannot withdraw from the stipulation at this stage of the game.

What is more, I have of course cited *Clefstad* case and all the other cases, including *Sablowski*, which holds [p. 7] that contingent awards are not contrary to the statute, and the Deputy Commissioner has power to approve a settlement agreed on which is properly conditioned.

This was not a litigated cased [sic]. This was not a case that the judge issued a compensation order. For whatever reasons, the parties decided to settle this case, and they submitted it to a judge and it was settled. It was an 8(i) settlement. That plain and simple.

If it looks like a duck, and walks like a duck, and it sounds like a duck, it must be a duck. So, it was an 8(i) settlement, and the *quid pro quo* was that the Claimant agreed that he would not shoot the dice at that time and seek a greater compensation award, nor would he attempt to modify it in the future, nor can he modify it now.

And the same thing should hold true for the Employer. It is a strawman to say that the parties couldn't settle this claim because they are not allowed to settle 8(f) cases. I totally agree with that. That isn't what they were doing.

What they did was they agreed to a settlement, that the Claimant was going to get $80.16 from somebody. If the Employer lost his 8(f) petition, Metropolitan would be

on the hook and it would be an 8(i) settlement, and they would have to pay him to this day.

The fact that the Employer was fortunate enough to [p. 8] be able to get 8(f) relief can't be used now as a weapon against the Claimant to withdraw from a settlement that they already made.

The second argument that I have is – the second objection – let me clean that up. Just so the record is clear, Your Honor, I want it on the record that the Claimant formally objects to the introduction of any evidence at this hearing on the guise of a 922 petition by the Employer for the reasons stated.

In addition to that, the Employer has not submitted any medical. I make an offer of proof now that they have no current medical. It is the Claimant's condition that in this circuit, in the Ninth Circuit, since 1933 in the *McCormick* case, the Ninth Circuit has held that the change of condition to justify a 922 modification has to be predicated upon a change on medical condition.

They don't have that. There is a Fourth Circuit decision, *Fleetwood*, which was recently decided, which I have cited, and I have a copy. I would be happy to give it to the court. There is a strong dissenting opinion, by the dissenting judge in the Fourth Circuit,that indicates that there are many reasons why you have to have the medical basis for a 922 petition.

Otherwise, every time the economy hiccups, you are going to either have a line of longshoremen filing 922 [p. 9] motions or the employer is going to be filing 922 motions. It has nothing to do with the change in the economic condition

of the individual based upon his medical at the time of the finding, the time that they agreed or an order was entered establishing his disability, but rather it is due to economic conditions.

Finally, Your Honor, if this Court or any reviewing court deems that the intention of the parties in 1983, when they entered into the stipulation – that the settlement of this claim is an issue, then the Claimant objects to any other Administrative Law Judge proceeding on this case, except Judge Butler, who was there and heard it, and presumably has some record or recollection of what exactly did occur.

JUDGE STEWART: Okay. Mr. Wood.

MR. WOOD: Trying to take these items in turn, I would like to stress that counsel did not, in his pre-trial statement, make a request for a change of judge or I would have provided a case which is right on point, showing that for purposes of modification any judge can hear the proceeding. It does not have to be the judge that issued the original compensation order.

But be that as it may, with regard to the argument that this case has been settled, we have our own trial brief which the Employer would like to submit on its behalf and [p. 10] incorporate herein, which points out, we think quite clearly, with the case of *Laurence*, which is cited therein, that this cannot be a settlement of the case.

It did not conform to the provisions of Section 8(i), (a), or (b), and is therefore not a settlement. Furthermore, it is demonstrated that the process of a settlement – and I use that term in the specific word of art – particular

emphasis must be made as to the manner in which it is submitted and approved.

Lastly, it is impossible to have a settlement that binds to Special Fund, and therefore, since the Judge entertained the Section 8(f) relief, it is pretty obvious the Judge did not consider this to be a settlement.

Counsel's other argument for the Claimant relates to the parties stipulating to the facts. Of course, there are two way [sic] to get evidence before the judge. One is to put on the evidence and otherwise to stipulate. But either way, the judge is not bound by any of the evidence.

And the law requires the judge to make an independent judgment, not only with regard to Section 8(f) relief but with regard to the issue of disability, the extent thereof, and the amount of the compensation that is to be awarded.

So, even though we did enter into certain stipulated facts, the judge still, by law, had to make an [p. 11] independent judgment. And our exhibits include a copy of his decision. Now, in this case it is true, he did incorporate the parties' stipulation on disability. But we all know that he didn't have to do that.

In any event with regard to counsel's objection to the Employer seeking modification pursuant to Section 22, we have covered that with the authority right within the section, which provides that, even though the Special Fund is paying the claimant, the employer, as an interested party, is entitled to seek modification if the facts warrant it.

Next, with regard to no medical, counsel is relying on a case – I think he said 1933. This Act has been amended in 1984, and there are other cases since then which clearly support a change of condition based on economic grounds as a valid basis to pursue modification.

That is what the Employer is doing in this case.

Separate from those items, we simply show that this individual has continued working in the same industry he has worked in before. He has not made a change into some other industry, which might be temporary in nature and potentially leave open for the future some further diminished earnings.

As it is, this gentleman is earning approximately $1700 a week. At the time of the award, he was earning [p. 12] approximately $545 a week. Now, we are well aware – and we wouldn't trouble the Court with this proceeding, by way of our application, if it was simply a matter of telling the Court that, well, $1700 is a lot more than $545, and therefore, it should be modified.

What we have done and what we propose to do here, with our exhibits, is to demonstrate that no matter how you approach this earnings increase, throughout the time span involved, whether you use the national average weekly wage based on inflationary factors or whether you use the actual union increases which come into play by way of union contract agreements every year, that he would have no reasonable basis whatever, through normal attrition of these benefits, to be making the kind of money he is making now.

So, he is still making at least $600 a week more than any of these compounded benefits for the time span in-between. So, in its simplest terms, we say, number one, the Employer does have the right to seek modification. Number two, this is a proper case for modification. Number three, we have earnings capacity demonstrated for this Claimant which supports our position. Thank you.

JUDGE STEWART: Okay. Do you have any evidence you want to present, Mr. Pierry? I am not going to make a decision here today, counsel. I will have to study the issue, and then I will write a written decision. But I am [p. 13] not going to make a decision at the bench here today.

MR. PIERRY: I know this has to end, Your Honor. It can't go on forever. If I may just quickly summarize and respond.

JUDGE STEWART: Okay.

MR. PIERRY: Section 908 states, "Whenever the parties to any claim for compensation under this Act agree to a settlement, Administration Law Judge shall approve the settlement."

I direct your attention to the only document we have in front of us, not what Mr. Wood says that document says, but look at the document itself. The document says, "The parties have stipulated as follows . . . " And they lay out in No. 6 just exactly what they are doing. They lay out in No. 11 that, "These stipulations resolve all issues between the parties, and the parties respectfully request award issue in accordance therewith."

That is what they did. They settled this case. If Administrative Judges want to have these cases bounced back at

them, then I suppose that is where we are going. But as far as the authority in this circuit for a 922 modification as to change of condition, the Ninth Circuit has religiously and without fail, since 1933, followed the *McCormick*, which held that in order to have a 922 modification, the condition precedent is that there was a [p. 14] physical change in the Claimant's condition since the time of the award.

The only decision that he can point to on that level is the Fourth Circuit *Fleetwood* decision, which is a vigorously dissented decision in the Fourth Circuit, with a vigorous dissent by one judge, who I greatly admire, Your Honor.

I think you are bound by the Ninth Circuit. We are sitting in San Pedro, California, and until the Ninth Circuit of the United States Supreme Court changes that decision, then I think you are bound by that decision.

JUDGE STEWART: I would agree we are bound by the law in the Ninth Circuit. Now, as to what the law in the Ninth Circuit is, that is another question. But we are bound by the law in the Ninth Circuit. There is no question about that. We are not bound by the law in the Fourth Circuit.

Do you have any evidence that you want to present at this time?

MR. PIERRY: May I submit the *Fleetwood* decision, Your Honor?

JUDGE STEWART: Okay. Fine. Now, how do you want to – you already have Claimant's Exhibit No. 1, which has been admitted into evidence. Do you want to make this Claimant's Exhibit 2?

[p. 15] MR. PIERRY: Two.

JUDGE STEWART: Do you have any objection?

MR. WOOD: Well, it is just that I think you threw me a little bit when you accepted a trial brief as an exhibit.

JUDGE STEWART: I agree, it is not evidence.

MR. WOOD: All right. That is what I –

JUDGE STEWART: There is no question about it.

MR. PIERRY: The only reason I –

MR. WOOD: Well, I –

(The document referred to was marked for identification as Claimant's Exhibit No. 2 and received into evidence.)

JUDGE STEWART: We have nothing else, I gather, here today?

MR. WOOD: I have exhibits I wish to offer.

JUDGE STEWART: Oh, okay.

MR. WOOD: And if need be, I will call the Claimant.

JUDGE STEWART: I am bending the rules; there is no question, Mr. Wood. Because it is not evidence.

MR. WOOD: Well, I don't care what number it is given, just so it is not evidence, that is all.

MR. PIERRY: Just as long as it is on the record. I don't want it to be like the –

[p. 16] JUDGE STEWART: Right. Right –

MR. PIERRY: – *Pigrenet* decision, where later the BRB ducts [sic] the issue by saying it wasn't raised by the Claimant at the hearing, therefore it was waived.

JUDGE STEWART: I understand your position, Mr. Pierry. You are trying to make exactly clear what your legal position is.

MR. PIERRY: Thank you.

JUDGE STEWART: And you want me to have access to all of the cases that are pertinent to this particular decision. And I appreciate your effort.

MR. PIERRY: Thank you.

JUDGE STEWART: As far as evidence, it is not evidence.

Does that complete your case, Mr. Pierry?

MR. PIERRY: I don't put the case on. He has got the –

JUDGE STEWART: Yes, I know.

MR. PIERRY: Oh. This completes my statement, yes.

JUDGE STEWART: Okay. Fine.

MR. WOOD: Your Honor, we would like to offer Employer's trial brief and the exhibits, if we may.

MR. PIERRY: I have objections to each and every one of them.

[p. 17] JUDGE STEWART: Okay.

MR. WOOD: That is the brief and the exhibits that he is going to argue about, I believe.

JUDGE STEWART: Okay. And you have identified the exhibits as Exhibits A through H.

(The documents referred to were marked for identification as Employer's Exhibits A through H.)

JUDGE STEWART: Mr. Pierry, you have objections to every one of them?

MR. PIERRY: Every single one of them, Your Honor.

JUDGE STEWART: What is your objection to Exhibit A?

MR. PIERRY: Exhibit A, I don't know what it is. It is on Mr. Jim Wood's stationery. I have no idea where these figures came from. He has no affidavit, no jurat by anybody, certifying what these numbers are. I haven't got the faintest idea what they are and I don't believe the Court does either.

JUDGE STEWART: Do you want to respond, Mr. Wood?

MR. WOOD: Yes. These exhibits are numbered in sequence, as the Court said, starting with Exhibit A, and all the pages are numbered.

The Court will note on Page 2 is a breakdown tabulated by the Department of Labor.

[p. 18] MR. PIERRY: I have no objection to that document.

MR. WOOD: That in turn provides the basis for Page 1.

MR. PIERRY: I object to that, Your Honor. If the Court wishes to do some calculation, that is fine. But Mr. Wood should not be able to.

MR. WOOD: Let's let me finish, please.

JUDGE STEWART: One at a time, please. Okay, Mr. Wood.

MR. WOOD: That simply takes the mathematical significance of the numbers and translates it, using the Claimant's average weekly wage at the time of the injury, compounding it up to what it would be October 1, 1989.

So, if counsel doesn't object to Page 2, which is the foundation for Page 1, then I am not sure I appreciate the objection.

MR. PIERRY: Is Mr. Wood taking the stand and testifying as an expert in this? That is what I am objecting to. It is irrelevant and immaterial, and we have no foundation for it.

JUDGE STEWART: Your objection is overruled. It will be admitted into evidence. Employer's Exhibit A will be admitted into evidence. I appreciate your position, Mr. Pierry, but let's face it, Page 1 of Exhibit No. A goes to the weight that I am going to give this particular evidence.

[p. 19] I might not give it any weight at all, but it is admitted into evidence.

(The document referred to, having been previously marked for identification as Employer's Exhibit A, was received into evidence.)

JUDGE STEWART: What about B?

MR. PIERRY: B, Your Honor, this again – Mr. Wood asked the Court to take judicial notice of some fellow by the name of Mike Carmelich and what he said in some other case.

And if he wants to have Mr. Carmelich come in and testify and make an offer of proof – he is available; I spoke to him last week. He is in town. I object to this evidence coming in. Again, it is without foundation. I don't know what it proves.

JUDGE STEWART: Mr. Wood, I think you have a serious problem as to Exhibit No. B.

MR. WOOD: Well, Your Honor, on Page 4 I cite the authority which clearly states, on 29 C.F.R. 18.48, that records and other proceedings may be offered in similar proceedings.

Now, we have already been through this modification procedure in the *Henry Corbos* (ph.) case. And –

[p. 20] MR. PIERRY: I –

MR. WOOD: Just a second. And Mr. Carmelich did testify and he did offer – the claimant offered into evidence this very same documentation.

It is nothing more than a guideline of the yearly basic longshore pay increase on hourly rates. And if he has an argument against it, it is not with me. He has been served

before this trial – I didn't just serve it on him today. He was served, whatever it is, 10 or 12 days ago with this document.

And I don't understand why he would have an objection to it.

MR. PIERRY: Your Honor, let me cite to you the case of *Jordon versus Davis Construction Corporation.* It is a BRB decision, on judicial notice. And the Court makes it very clear that even where the administrative tribunal may take judicial notice of extra record facts, because of the vulnerable position in which the opponent is placed by judicial notice, the administrative law judge must be concerned with certain protective measures.

I don't have any chance to cross examine this man. I have no idea where these records came from or the truth or veracity of them. I believe it is an improper exhibit. May I give the case – Claimant's 3.

JUDGE STEWART: Yes.

[p. 21] (The document referred to was marked for identification as Claimant's Exhibit No. 3 and received into evidence.)

MR. PIERRY: 9 Benefits Review Board's –

JUDGE STEWART: I agree Mr. Pierry. I am going to sustain your objection.

MR. WOOD: With regard to that item, Your Honor, we would like to then extract it from our exhibits and append it to our pre-trial brief.

JUDGE STEWART: Okay.

MR. WOOD: Since that is not an exhibit for evidence.

JUDGE STEWART: Right.

MR. WOOD: So, may I jerk it out of there.

JUDGE STEWART: Okay. Fine.

(The document referred to, having been previously marked for identification as Employer's Exhibit B, was withdrawn from evidence.)

MR. WOOD: What was the citation on *Davis – Jordan versus Davis,* BRB?

MR. PIERRY: 9 Benefits Review Board Service – (NOISE) –

MR. WOOD: Volume 9 did you say?

[p. 22] MR. PIERRY: 9.

MR. WOOD: Thank you very much.

JUDGE STEWART: Okay. Now, what is your objection to Exhibit No. C?

MR. PIERRY: None, Your Honor.

JUDGE STEWART: Okay. Exhibit No. C will be admitted into evidence.

(The document referred to, having been previously marked for identification as Employer's Exhibit C, was received into evidence.)

JUDGE STEWART: What about D?

MR. PIERRY: Yes, I object to that, Your Honor.

JUDGE STEWART: What is your objection?

MR. PIERRY: I have no objection to the PMA records, which it is cut off on my exhibit, but it is the last seven pages of that exhibit. I only object to the cover sheet where Mr. Wood gives us the benefit of his evaluation of what these records mean.

MR. WOOD: Could you identify that by a page number?

JUDGE STEWART: The problem is I have the same problem here. The bottom is cut off, and I can't tell what – oh, I see, someone has written here, at least part of them, in ink.

[p. 23] MR. WOOD: The only part that is cut off – some of that earnings came to us on fax paper, which is a little longer, so when it was photocopied, just the page number was cut off. That has nothing to do with the records.

JUDGE STEWART: No. What is it – four pages, is that what it is supposed to be?

MR. WOOD: Well, I don't know where we are, Your Honor.

MR. PIERRY: Exhibit D.

MR. WOOD: Exhibit D, as in dog –

JUDGE STEWART: In and of itself, isn't it four pages?

MR. WOOD: That is correct.

MR. PIERRY: The first page is what I object to, not the records from PMA.

JUDGE STEWART: Okay. Do you want to respond, Mr. Wood?

MR. WOOD: Yes, Your Honor. PMA records are tedious to review, and it has been our practice in many cases in my office to retype the actual information from the PMA. This takes no interpretation whatsoever, but it simply lists it in a straight line instead of horizontal and otherwise, as shown on their record.

So, we consider that to be entirely consistent with normal legal procedures. If counsel can point to a [p. 24] flaw, that would be entirely different.

MR. PIERRY: Your Honor, I don't think I have to make his case. He has to come in with admissible evidence. What he is doing now is he is testifying in this to all these exhibits. And I object. I don't have the opportunity to cross examine Mr. Wood.

I shouldn't have to point out any flaws. I think the court is capable of reading records. I think if he wants to put in records, that is fine, but I don't think he should editorialize on them, except as closing argument.

JUDGE STEWART: Your objection is overruled. Exhibit D is admitted into evidence and I will give it the appropriate weight that I think it deserves when I write my decision.

(The document referred to, having been previously marked for identification as Employer's Exhibit D, was received into evidence.)

JUDGE STEWART: What is your objection to Exhibit No. E?

MR. PIERRY: None, Your Honor.

JUDGE STEWART: Okay. Exhibit No. E, then, is admitted into evidence.

[p. 25] (The document referred to, having been previously marked for identification as Employer's Exhibit E, was received into evidence.)

JUDGE STEWART: What about F?

MR. PIERRY: Of course, I object to this whole procedure.

JUDGE STEWART: I understand. I understand your position, Mr. Pierry.

MR. PIERRY: Again, the exhibits attached to it seem to be all the exhibits that we have just done – I don't want him sneaking them in the back door, after the Court has ruled on them.

Again, I would not object to any of the PMA records that are attached, nor to the 208, but I object to Mr. Wood's cover sheet.

JUDGE STEWART: On F?

MR. PIERRY: F. That is the application.

MR. WOOD: My F is all PMA stuff.

MR. PIERRY: My F is Employer's Application for Modification, Section 922.

JUDGE STEWART: He is correct. That is what I have, too.

MR. WOOD: Oh, I beg your pardon. That is included within. That is correct. Well, that is a [p. 26]

pleadings, Your Honor. It is just informative. That is how we got here in the first place.

JUDGE STEWART: Objection overruled.

MR. PIERRY: I have no objection to G and H.

JUDGE STEWART: Okay. Then, Exhibits F, G, and H are admitted into evidence.

(The document referred to, having been previously marked for identification as Employer's Exhibits F, G, and H, were received into evidence.)

MR. WOOD: With regard to Exhibit B, Your Honor, if we may jerk that out of the collection and add it to the Employer's pre-trial brief, it would be appreciated. You have the brief.

JUDGE STEWART: Yes. You want to add it in here. Okay. (Pause.) Thank you.

Does that complete your case or are you going to have some testimony?

MR. WOOD: I would like to call the Claimant, Your Honor.

JUDGE STEWART: Okay. Fine. Mr. Rambo.

Let's go off the record a moment.

(Brief discussion off the record.)

JUDGE STEWART: Back on the record.

[p. 27] Whereupon,

JOHN RAMBO

was called as a witness herein and, having been first duly sworn, was examined and testified as follows:

JUDGE STEWART: Go ahead, Mr. Wood.

MR. PIERRY: Your Honor, again for the record, the Claimant objects to introduction of any evidence, including this testimony, for reasons already stated on the record.

JUDGE STEWART: Right. Right. Because you don't think the record should be reopened for any reason.

MR. PIERRY: That is right.

JUDGE STEWART: Okay. Go ahead, Mr. Wood.

DIRECT EXAMINATION

Q BY MR. WOOD: Would you please state your full name.

A John D. Rambo.

Q Mr. Rambo, what is your occupation?

A Longshoreman.

Q Were you so occupied in 1980, when you sustained an injury while working for Metropolitan?

A Yes.

Q Your employee number with Pacific Maritime Association, what is that?

A 333130.

Q Would you do that number again for us? 33130?

[p. 28] A 33130.

Q Yes. Thank you. I thought you had an extra 3 in there before. Are you currently employed full time for as a longshoreman?

A Yes.

Q In what capacity?

A Crane operator.

Q About how long have you been a crane operator?

A Four years – five years. Five years.

Q As a crane operator, are you working steady for anyone?

A Yes.

Q Separate from when you are working as a crane operator, do you also sign for what they call volunteer for other jobs?

A No.

Q As a crane operator – according to the Occupational Codings of Pacific Maritime Association, in the year 1988 they showed, for instance, that you put in eight hours as a dockman, for which you were paid.

A I would have to look at my time book.

Q They also show you put in 16 hours as a lift truck operator.

A Okay. I might have. I don't know.

Q They also show you put in time as a heavy lift [p. 29] truck operator. That is a little different pay, isn't it?

A That is just driving a bigger forklifts.

Q Now, if you are working steady for someone as a crane operator, how would it come about that you would sign out with classifications such as a dockman or a lift truck operator, et cetera?

A What do you mean?

Q Let's do it another way. As a steady crane operator for a particular employer, are you expected to be available to them on call?

A Yes.

Q And in exchange for that, are you guaranteed so many hours pay per week?

A Yes.

Q And as such, if they tell you that they are not going to need you on a particular day, are you then eligible to volunteer for work through the dispatch hall?

A If I go to the hall.

Q If you wish to, correct?

A Yes.

Q Now, is that the means by which you can get work as a dockman or a lift truck operator by volunteering?

A Yes.

Q And in order to do that, you would have to go through the old procedure of getting dispatched?

[p. 30] A Yes.

Q And if you do that, you get paid extra for it?

A Yes.

Q And you are still available for the guaranteed hours that your steady employer would otherwise be paying you?

A Yes.

Q Now, we have shown documents here that we have been debating – you heard us debating – from Pacific Maritime Association. Is that where your check comes from?

A Yes.

Q And on your check, the stub that comes with it, will it usually show the identity of each employer you may have worked for, assuming you worked for more than one and that employer's code or number as listed with PMA.

A Yes.

Q So, if you sit home, you can keep your own time book and make sure that you got paid for whatever day you actually work and for whom you work?

A Yes.

Q Now, is that still the way it is as of right now?

A Yes.

Q Is that the way it was before you were injured and at the time of your injury in September of 1980?

A I could volunteer then, yes.

[p. 31] Q At that time, you were not a steady crane operator, then?

A No.

Q Now, currently, they show that most of your hours, the bulk of your hours, are as a gantry crane operator?

A Yes.

Q What is a gantry crane?

A I sit in a chair, like this, with arms, and I have two handles. I just operate it.

Q Is that one of those large items over there on the waterfront that moves containers on and off of vessels?

A Yes.

Q How high off the ground is that?

A Our crane I think is 121 feet.

Q How do you get up there?

A Elevator.

Q Do you only work one crane and that one crane has an elevator?

A APL has five cranes and they all have elevators.

Q So, you are telling me, then, to get on those particular cranes it is not necessary to go up or down the ladder?

A There is a ladder there, 12 feet, 15 feet. I don't know. Then we get on an elevator.

Q So, you can use the elevator for part of the way [p. 32] and a ladder for part of the way?

A Elevator almost all the way, all the way to the top. Just 12 feet – I climb, say, a 12-foot ladder, go into the elevator, and I go up the rest of the way.

Q Okay. So, the elevator doesn't pick up until about 12 feet off the ground?

A Yes. I am guessing on the 12 feet.

Q Approximately.

A Yes.

Q And when you are doing this, this is normally your everyday job?

A Yes.

Q Before you became a steady with one particular employer – which employer is that?

A Before?

Q Excuse me. I will retract that. You are steady with whom?

A Right now?

Q Yes.

A American President Lines.

Q And before you became a steady with them, had you also worked as a crane operator through the hall?

A They picked me up when I made the list on seniority. I went with SSA. They asked me to go steady.

Q So, as soon as they knew that you were available [p. 33] as a crane operator, you were picked up by SSA?

A Yes. Seniority list.

Q And then, in the meantime, you have went over with American President Lines?

A Yes.

Q Now, they have a crane board at the union dispatch hall, as well, do they not?

A Yes.

Q I missed that.

A Yes.

Q And they also have a rule now that steady crane operators are not supposed to work more than 45 hours a week, is that true?

A Under the new contract, 42½.

Q 42½. And the reason for that is to assure that other crane operators out of the hiring hall will get work?

A Yes.

Q We don't know how much they are going to get, but they are going to get more than they would otherwise, isn't that true?

A Yes.

Q Because before some of the crane operators were working more than 45 hours a week.

A The hall was good – (Not audible.)

Q Now, is your job that you presently have of [p. 34] indefinite duration?

A No.

Q What is not definite about it? What is not indefinite about it?

A Matson laid off 50 guys. They can cut back on us and I would have to go back to the hall.

Q You are not working for Matson, right?

A No.

Q But what you are telling me is that one of the lines did lay off some people.

A Yes.

Q Has anyone told you you are being laid off?

A No.

Q Has there been anything specific said that causes you to feel, with any reasonable certainty, that your job is not going to go on indefinitely?

A I don't under –

Q If you don't understand, I would be pleased to rephrase it, if I may.

A I don't know if it is indefinitely or not.

Q But at the moment it is? What I am getting at is –

A I could be there next year. They might close down in two years, five years; I don't know.

Q All right. How long have you been there so far?

[p. 35] A Two-and-a-half years.

JUDGE STEWART: Do you know of anyone that has been laid off for any reason?

THE WITNESS: Well, Matson Company, lack of work – I heard they laid off 50 people.

JUDGE STEWART: What about your company?

THE WITNESS: Well, so far, there are only 15 or 16 of us on nights, and –

JUDGE STEWART: And no one has been laid off?

THE WITNESS: Not right now, no.

JUDGE STEWART: Okay. Go ahead.

Q BY MR. WOOD: Of that number of people, how many are crane operators?

A On nights?

Q That you just mentioned. You gave the Judge a number of 16 people.

A I think 16 on the nights.

Q All crane operators?

A Yes.

Q And as always, let's suppose that you were told that they weren't going to need you today over at American President Lines. Could you also volunteer as a crane operator out of the hall?

A If there is work?

Q That is what I mean.

[p. 36] A Yes. If there is work, which I don't go to the hall. I haven't went – I forgot about the times you told me there, but that was the last time I went.

Q I want you to assume that we have in evidence the PMA earnings records relating to your payroll. What do you estimate your average weekly wage was in 1988, approximately?

A This is '90 –

Q '88.

A That is what is am thinking – this is '90 – 75 to 80. I don't know.

Q Well, let's say the calculations show it is in excess of – around $1600 a week. Does that seem approximately right to you?

A Right now, with our new payroll, I make $1550 a week.

JUDGE STEWART: Now. But what about 1988?

THE WITNESS: I don't know what I made a week then.

Q BY MR. WOOD: In 1989, it showed, according to the payroll, that you averaged approximately $1700 a week. Does that seem correct?

A I don't know.

MR. PIERRY: Your Honor, I object. He doesn't have those records in front of him, and I think he is asking [p. 37] him to speculate. The records speak for themselves.

JUDGE STEWART: Objection overruled. Go ahead.

Q BY MR. WOOD: If you don't know the answer, just tell us you don't know the answer. I am just asking you does $1700 seem about correct per week?

A I can't tell you that.

Q Do you recall what you earned for the whole year in 1989?

A No, I don't.

Q But you are satisfied that every check you get comes through Pacific Maritime Association?

A Yes.

JUDGE STEWART: Do I understand correctly, Mr. Rambo, that if you were laid off at American President and you had to try to get work some place else, would your chances of getting a new job depend upon seniority?

THE WITNESS: Only in crane – it took me 20 years to become a crane operator. Then I made the list. Now, if I go back to the hall, it is whatever company wants to pick up a crane operator. There is no seniority.

JUDGE STEWART: They can pick up anyone they want?

THE WITNESS: They can pick up anyone they want.

JUDGE STEWART: Okay. Go ahead.

Q BY MR. WOOD: But nevertheless, you could still work through the hall, not only as a crane operator but in

[p. 38] any other capacity that you feel you want to work through the hall?

A I –

Q You could work like you have. You could work as a dockman if you wanted to.

A Yes.

Q Or as a heavy truck operator or –

A Yes. Something that I don't have to bend over and pick up.

Q The crane operator's work is preferred, I take it, because it pays more?

A Yes.

Q And if you are a steady, you get guaranteed hours?

A Yes.

MR. WOOD: I have nothing further, Your Honor.

CROSS EXAMINATION

Q BY MR. PIERRY: Crane operator's work is preferred, not only because it pays more but because it is an easier job, isn't it?

A Yes.

Q Physically less demanding?

A Oh, yes.

Q Has your physical condition since 1983 gotten better, or worse, or stayed the same?

A I would say at least the same, because I still [p. 39] can't do certain things.

Q And how many days a week on average do you work?

A Three, maybe four.

Q On the average, if you have 52 weeks in front of you, how many would you say you work three days per week?

A What do you mean –

Q The last 52 weeks –

MR. WOOD: I object. The question has been asked and answered, three to four days a week.

JUDGE STEWART: Objection overruled. Go ahead.

Q BY MR. PIERRY: How many weeks out of the last 52 did you work three? If you can give us a percentage, a majority, a minority, 50 percent –

A I would say the majority three, maybe four, if I am answering right.

Q When you went to crane school in 1986, there were four instructors, were there not?

A Yes, there were a few of them, yes.

Q They came and went, but there were four positions where PMA and the union had four different guys

instructing the various people that went through that class on how to operate these hammerhead cranes, correct?

A Yes.

Q They are down to one, isn't that correct?

A I don't know. Since I graduated, I couldn't tell [p. 40] you.

MR. PIERRY: I would make an offer of proof, Your Honor, that they are down to one.

MR. WOOD: Well, I object, Your Honor. We were talking about attorneys testifying.

JUDGE STEWART: Objection sustained.

Q BY MR. PIERRY: Do you know, from whatever knowledge, any source, as to what the plans of the union and the PMA to bring in more crane drivers are? Are they going to bring in more, less, the same or –

A Right now –

MR. WOOD: I object, without foundation.

Q BY MR. PIERRY: Your own knowledge, whatever you can tell us.

JUDGE STEWART: Objection is overruled.

THE WITNESS: Right now there is not enough work at the crane hall – at the hall – because that is why they are lowering our hours.

Q BY MR. PIERRY: If you lose your job at Eagle Marine, you go back to the – you work out of the hall, correct?

A Yes.

Q As low man out at the hall, isn't that right?

A Yes. You go on an hourly system.

Q Could you explain to the Court what low man out [p. 41] means?

A If we work tonight, we get eight hours – nine hours on the print. And if I go out – say I am 10 guys out and I don't get out tonight, tomorrow night I will be on, say, zero hours. This guy is on nine. Then I take a job.

Then I come back. I check in on nine, but he is on the board before me and he would get the job first.

Q Let me take you back to 1983. Your case was set for hearing before the United States Department of Labor, on Wilshire Boulevard. Do you remember that?

A Yes.

Q And you drove down with your attorney at the time, whose name was –

A Goldwater.

Q Goldwater. And after you checked in, you went down to the cafeteria, and you sat at one table and Mr. Goldwater and Mr. Wood sat at another table. Is that right?

A Yes.

Q Tell the Court what happened after that?

A They called me over there after Goldwater and Wood were talking, and Goldwater said that we were

going to get $80 – say, $80 and some change a week. And I looked at him and Wood said – Goldwater said, "This is your settlement." And then, Wood said, "You will get this as a settlement."

And I said – because the sum was little, the [p. 42] amount I was getting, I said, "Well, this isn't very much." I talked to Goldwater, and they said, "You [sic] settlement will be this for life."

Q Who said that?

MR. WOOD: Your Honor, I am going to object at this moment, to hearsay statements made by his attorney, which the attorney is alive and he is available. He could have been called as a witness. We are being quoted – I don't know what Mr. Goldwater told him, and it is irrelevant what he told him.

JUDGE STEWART: Objection sustained.

MR. PIERRY: For the record, Your Honor, may I be heard. This is percipient testimony. He is testifying to what he heard Mr. Goldwater say in front of Mr. Wood, and Mr. Wood was there. This isn't hearsay.

THE WITNESS: He told me for life.

MR. PIERRY: This is percipient testimony.

JUDGE STEWART: Mr. Wood.

MR. WOOD: It is being offered for the truth of the matter. That is what makes it hearsay. Mr. Goldwater could have told him anything. If he wants to disagree with Mr. Goldwater –

JUDGE STEWART: He said Mr. Wood.

MR. WOOD: Well, I hear what he is saying, Your Honor. I will have to call myself as a witness then, I [p. 43] guess.

JUDGE STEWART: Well, he said he heard you say it. He has a right to testify as to what he heard you say.

Go ahead.

MR. PIERRY: That is all I have, Your Honor.

JUDGE STEWART: Any redirect?

REDIRECT EXAMINATION

Q BY MR. WOOD: Were you aware at all times that I was the attorney for Metropolitan, while your case was in litigation?

A Only when we went to court, as far as I remember.

Q Did you ever discuss with Mr. Goldwater the difference between a settlement and a compensation aware [sic]?

A He discussed – I don't remember everything, but I do remember sitting there in the cafeteria with both of you.

Q The word "settlement" might be – did anybody use the word –

A He said for life.

Q – resolution of the claim or submission of the facts or anything like that?

A I don't recall that. All I know is you said for life and Goldwater wrote it down on a piece of paper, and you two were taking about it.

Q He never told you about the provisions in the Act that provided for modification, in fact that you could [p. 44] modify it and get more money if you later got worse? He never discussed that with you?

A I don't know if he did or not. All I know is that it was said that I had it for life.

JUDGE STEWART: By Mr. Wood?

(Brief pause off the record.)

JUDGE STEWART: The answer was by Mr. Wood and by Mr. Goldwater.

MR. WOOD: Well, let's go back and hear it. I want to hear it myself, if I may, because the machine stopped running.

Q BY MR. WOOD: Who told you that you would have this payment for life?

A Both of you.

Q Who is both of us?

A You and Goldwater.

Q I told you that you would have this payment for life?

A We were sitting there in the cafeteria. You were on the left. You called me over later, and you were talking about what I am going to get a week. You said, "You will get this for life." Goldwater was saying – I looked at him and he said, "Well, this is the rest of your life."

And he wrote it down in the figures. "This is what you get two weeks, and you will get this for the rest [p. 45] of your life."

Q And who said that?

A Goldwater said that, and you said, "For your life."

Q I said, "For your life"? I told you that?

A You were saying – between – now you are getting me confused – between both of you that I was supposed to get this for life.

Q So, don't worry about what I said. Your attorney never told you that this case could be modified either at your request or the Employer's request?

A I don't know if he told me that or not, because I just was listening. I don't remember that.

Q Well, don't you think that would be germane to the discussion as to whether you are going to get something for life or not, if it could be modified?

A I understood I had it for life.

Q You have received your payments continuously up until today, haven't you?

A Yes.

Q And that was following the Judge's order?

A Yes.

Q So, I take it from what you say that your impression was that Mr. Goldwater was settling your case, is that what you are telling us?

[p. 46] A Yes, with you, yes.

Q With me?

A Well, I mean, we were there together. You were there with –

MR. WOOD: Your Honor, it may be that we have a mistake of fact here, and what really should happen is the award should be vacated going back to the date of its inception, if that is the case. In which event, we would request reimbursement and go to trial on the issues.

JUDGE STEWART: That is not going to happen, Mr. Wood. Go ahead.

MR. WOOD: I have nothing further.

MR. PIERRY: Nothing further, Your Honor.

JUDGE STEWART: Fine. Does that complete your case, Mr. Wood?

MR. WOOD: It does.

JUDGE STEWART: Okay. You may step down.

(Whereupon, the Witness was excused.)

JUDGE STEWART: And you had indicated you have nothing at all, Mr. Pierry, except your legal argument.

MR. PIERRY: Yes, Your Honor.

JUDGE STEWART: Okay. Fine.

Since we have the trial brief – Mr. Wood do you want to write a brief after the hearing here today, in addition, or not?

[p. 47] MR. WOOD: Well, I could for the purpose of citing the case that he brought up, the issue of whether Judge Butler had to hear this case or not.

JUDGE STEWART: Yes. Do you or don't you? That is all I want to know.

MR. WOOD: No. That is clear. I don't think it is necessary.

JUDGE STEWART: Okay. Mr. Pierry?

MR. PIERRY: No, Your Honor.

JUDGE STEWART: Okay. Fine. This hearing will be concluded at 3:13 p.m. Thank you, counsel.

(Whereupon, at 3:13 p.m., the hearing in the above-entitled matter was adjourned.)

U.S. Department of Labor Office of Administrative Law Judges
211 Main Street – Suite 600
San Francisco, California
94105

(seal)

In the Matter of	
JOHN RAMBO, Claimant	Case No. 83-LHC-242
against	OWCP No. 18-6945
METROPOLITAN STEVEDORE COMPANY, Self-Administered Employer	

DECISION AND ORDER GRANTING MODIFICATION

This proceeding involves a request for modification of the November 28, 1983, Decision and Order Awarding Benefits of Administrative Law Judge Butler. The request for modification was filed on October 30, 1989, pursuant to the provisions of 30 U.S.C. § 922.

ISSUES

1. Whether the employer's request for modification of the 1983 Decision and Order under the provisions of 30 U.S.C. § 922 should be granted.

2. Whether the administrative law judge who approved the settlement is the one required to rule on the issue of modification.

Background

The parties stipulated that the Claimant, John Rambo, became permanently, partially disabled as the result of an injury to his back and leg sustained on September 9, 1980; that the Claimant's condition became permanent and stationary on November 16, 1981; and that the Claimant sustained an overall current permanent partial disability equivalent to 22½% of the whole person amounting to a compensation rate of $80.16 per week for permanent partial disability. This stipulated "settlement" was incorporated into a Decision and Order of the administrative law judge. The only issue which the administrative law judge decided in his Decision and Order was whether § 908(f) was applicable.

Then, on October 30, 1989, Employer filed an application for modification under Section 922 alleging that the Claimant's current earning capacity had increased substantially.

JURISDICTION

A. Administrative Law Judge

Claimant alleges that the motion for modification must be heard by the same administrative law judge assigned to the original claim. This allegation is without merit. In *Finch v. Newport News Shipbuilding and Dry Dock Company*, 22 BRBS 196 (1989), the Benefits Review Board held that there is no requirement under the Act that a motion for modification must be heard by the same administrative law judge assigned to the original claim.

B. Section 922 Modification

Claimant contends that the stipulations contained in the November 28, 1983, Decision and Order of the administrative law judge constitute a settlement between the parties. However, Judge Butler's Decision and Order awarding benefits does not constitute the approval of a settlement because it fails to provide in specific terminology for the complete discharge of employer's liability and does not contain findings as to whether the compensation awarded was in the Claimant's best interest as is required under Section 8(i) of the Act. *Finch v. Newport News Shipbuilding and Dry Dock Company, supra.* Therefore, Judge Butler's Decision and Order must be considered as an award of benefits based on the agreements and stipulations of the parties which is subject to modification pursuant to Section 22.

DISCUSSION

In the original Decision and Order dated November 28, 1983, it was stipulated that the Claimant's average weekly wages were $534.38 per week at the time of the pertinent injury, that Claimant sustained an overall current permanent partial disability equivalent to 22.5% of the whole person which produced a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability.

Section 22 of the Act, 33 U.S.C. §922, authorizes the modification of a Decision and Order based on a change in condition or mistake of fact at any time prior to one year after the last payment of compensation. Modification based on a change in condition may be granted in cases in

which the claimant's economic condition has changed following the entry of an award of compensation. *Fleetwood v. Newport News Shipbuilding and Dry Dock Company*, 16 BRBS 282 (1984).

Employer in the instant case contends that since Claimant is presently earning more money than at the time of his injury, Claimant did not have a loss of wage-earning capacity. However, higher post-injury gains/losses are not necessarily determinative of an employee's wage-earning capacity. *See Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649 (1979). One has to consider wage-earning capacity in an open labor market under normal employment conditions.

Claimant testified that he was working as a longshoreman in 1980 when he was injured, and that he is currently working fulltime as a longshoreman (Tr. 27-8).[1] He is presently working steadily as a crane operator for American President Lines (Tr. 28, 32). He has been working as a crane operator for four or five years (Tr. 28). In addition to working as a crane operator, Claimant volunteers for work as a lift truck operator and a heavy lift truck operator for which he receives additional pay (Tr. 28-30). When Claimant works as a crane operator, he works most of the time as a gantry crane operator (Tr. 31). The crane which he operates is 131 feet high (Tr. 31). In order to reach the place where he works, Claimant has to climb a 12 to 15 foot ladder and then take an elevator (Tr.

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[1] In this decision, "CX" refers to Claimant's Exhibits, "EX" refers to Employer's Exhibits and "Tr." refers to the transcript of the hearing.

31). As a crane operator, he is not allowed under the contract to work more than 42.5 hours per week (Tr. 33).

According to the Claimant, he is now making $1,550.00 per week (Tr. 36). He prefers doing crane work because it pays more money and it is easier work than some of the other jobs (Tr. 38).

Claimant testified that his physical condition since 1983, when he was awarded permanent partial disability, has remained about the same (Tr. 38-9).

According to the Claimant, Matson Lines has laid off 50 men; however, there has been no indication by the company for which he works that anyone is going to be laid off (Tr. 34).

The evidence in the instant case shows that Claimant earned a total of $70,662.67 for 1985 for an average weekly wage of $1,358.90; a total of $68,006.22 for 1986 for an average weekly wage of $1,307.81; a total of $67,953.72 for 1987 for an average weekly wage of $1,306.80; a total of $76,332.19 for 1988, for an average weekly wage of $1,467.93; a total of $87,873.53 for the work beginning December 31, 1988, and ending December 23, 1989, for an average weekly wage of $1,689.88; and a total of $67,619.96 for the week beginning December 30, 1989, and ending September 22, 1990, for an average weekly wage of $1,690.50.

Claimant's average weekly wages have increased from $534.38 per week in 1980 when Claimant was injured to $1,690.50 as of September 22, 1990. This demonstrates that the Claimant's average weekly wages more

than tripled from 1980 to 1990. After taking into consideration the increase in wages due to the rate of inflation and any increase in salary for the particular job, it is evident that Claimant no longer has a wage-earning capacity loss. Although Claimant testified that he might lose his job at some future time, the evidence shows that Claimant would not be at any greater risk of losing his job than anyone else. Moreover, no evidence has been offered to show that Claimant's age, education, and vocational training are such that he would be at greater risk of losing his present job or in seeking new employment in the event that he should be required to do so. Likewise, the evidence does not show that Claimant's employer is a beneficent one. On the contrary, the evidence shows that Claimant is not only able to work full time as a crane operator, but that he is able to work as a heavy lift truck operator when the time is available within which to do so.

Accordingly, I find that the Claimant no longer has a wage-earning capacity loss and that his disability payments should be discontinued effective on the date of this Decision and Order.

ATTORNEY'S FEES

Inasmuch as the Claimant did not prevail in this proceeding, the attorney is not entitled to any fee.

ORDER

It is hereby ORDERED that Claimant's disability be terminated effective as of the date of this Decision and Order.

/s/ Daniel Lee Stewart
DANIEL LEE STEWART
Administrative Law Judge

Dated: MAY 29, 1991
San Francisco, California

DLS:bll

U.S. Department of Labor
Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

(seal)

BRB No. 91-1538

JOHN RAMBO Claimant-Petitioner	)	**NOT PUBLISHED**
v.	)	
METROPOLITAN STEVEDORE COMPANY Self-Insured Employer-Respondent	)	DATE ISSUED: _____
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER
Respondent	)	(Filed Nov. 9, 1992)

Appeal of the Decision and Order Granting Modification of Daniel Lee Stewart, Administrative Law Judge, United States Department of Labor.

Thomas J. Pierry (Magana, Cathcart, McCarthy & Pierry), Wilmington, California, for claimant.

James J. Wood, Long Beach, California, for self-insured employer.

LuAnn Kressley (Marshall J. Breger, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington,

D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Modification (83-LHC-242) of Administrative Law Judge Daniel Lee Stewart on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On September 9, 1980, claimant injured his back and leg while working for employer. In a Decision and Order dated November 28, 1983, Administrative Law Judge James J. Butler awarded claimant temporary total disability compensation from September 10, 1980 through November 22, 1981, and permanent partial disability compensation thereafter. Pursuant to the stipulations of the parties, the administrative law judge found that claimant's average weekly wage at the time of injury was $534.38, that claimant had sustained a 22 1/2 percent impairment of the whole person which the parties equated to a $120.24 per week loss in wage-earning capacity, and that accordingly claimant was entitled to permanent partial disability compensation based on an $80.16 per week compensation rate. In addition, the administrative

law judge awarded claimant's counsel an attorney's fee payable by employer, *see* 33 U.S.C. §928, and awarded employer relief pursuant to Section 8(f), 33 U.S.C. §908(f).

Thereafter on October 30, 1989, employer sought modification of the permanent partial disability award pursuant to Section 22, 33 U.S.C. §922, arguing that there had been a change in claimant's wage-earning capacity such that he is no longer disabled. In a Decision and Order dated May 29, 1991, Administrative Law Judge Daniel Lee Stewart granted modification, noting that claimant had completed training and was currently working as a crane operator, a higher paying yet less strenuous job, which he had been performing for four or five years and was not in danger of losing. In addition, Judge Stewart noted that claimant also was able to obtain additional pay by volunteering to work as a lift truck operator and heavy lift truck operator. Finally, Judge Stewart found that claimant's average weekly wage had more than tripled between the time of his injury in 1980 and the hearing in 1990. After taking into consideration the increase in wages due to the rate of inflation and any increase in salary for the particular job, he concluded that claimant no longer had a loss in his wage-earning capacity. The administrative law judge therefore ordered that the award of permanent partial disability compensation be terminated as of the date of the decision and order. Claimant appeals, arguing that the granting of modification was improper. Employer and the Director, Office of Worker's Compensation Programs, respond, urging affirmance.

Under Section 22 an aggrieved party may seek modification of a compensation award within one year of the

date of last payment of compensation or within one year of the denial of a claim based on a change in condition or mistake of fact. 33 U.S.C. §922. With the enactment of the 1984 Amendments to the Act, Section 22 was amended to prohibit the modification of settlements which were entered into pursuant to Section 8(i), 33 U.S.C. §908(i)(1988). The Board had previously reached the same conclusion under the pre-1984 Act. *See Lambert v. Atlantic & Gulf Stevedores,* 17 BRBS 68 (1985).

Initially, we reject claimant's assertion that Judge Butler's original Decision and Order constitutes the approval of a Section 8(i) settlement which could not be modified pursuant to Section 22. This decision fails to provide for the complete discharge of employer's liability and lacks any findings as to whether the compensation awarded was in claimant's best interest as was required under Section 8(i) at the time of Judge Butler's decision. 33 U.S.C. §908(i) (1982) (amended 1984). Accordingly, Judge Butler's Decision and Order was, as Judge Stewart properly determined, simply an award of benefits based on the agreements and stipulations of the parties which is subject to modification pursuant to Section 22. *Norton v. National Steel & Shipbuilding Co.,* 25 BRBS 79, 84 (1991); *Lawrence v. Toledo Lake Front Docks,* 21 BRBS 282 (1988).

Claimant's contention that the administrative law judge erred in granting modification absent a showing of a change in his physical condition is similarly without merit. Contrary to claimant's assertions Judge Stewart correctly recognized that modification pursuant to Section 22 may be granted based solely upon a change in claimant's economic condition. *See Fleetwood v. Newport News Shipbuilding and Dry Dock Co.,* 776 F.2d 1225, 18

BRBS 12 (CRT) (4th Cir. 1985); *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1991); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49 (1989). Claimant has raised no error committed by the administrative law judge in weighing the evidence and granting modification based on claimant's increase in wage-earning capacity after the original award of benefits. We therefore affirm his determination that claimant was no longer disabled as of the date of his decision.

Accordingly, the administrative law judge's Decision and Order Granting Modification is affirmed.

SO ORDERED.

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals
Judge

/s/ Nance S. Dolder
NANCY S. DOLDER
Administrative Appeals
Judge

/s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals
Judge

Cite as 94 C.D.O.S. 4781

JOHN RAMBO, Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, Respondents,

No. 92-70783

United States Court of Appeals for the Ninth Circuit

OWCP No. 18-6945 BRB No. 91-1538

Petition for Review of an Order of the Benefits Review Board Argued and Submitted March 14, 1994 – San Francisco, California

Before: Stephen Reinhardt and Edward Leavy, Circuit Judges, and William D. Browning,* District Judge.

COUNSEL

Thomas J. Pierry, Magana, Cathcart, McCarthy & Pierry, Wilmington, California, for the petitioner.

LuAnn Kressley, United States Department of Labor, Office of the Solicitor, Washington, D.C., for the respondents.

Filed June 24, 1994

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*The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

LEAVY, Circuit Judge:

In 1983, the appellant John Rambo ("Rambo") was awarded $80.16 per week in worker's compensation for a permanent partial disability to his back and leg. Rambo subsequently attended crane school and obtained a position as a crane operator. In 1990, Rambo's employer, Metropolitan Stevedore Company ("Metropolitan") moved to have his benefits terminated. Despite the fact that Rambo's physical condition had not changed, Metropolitan argued that Rambo was no longer eligible for the benefits because he was presently working at a job that paid him $1,505.21 per week – almost 300% of Rambo's pre-injury average weekly wage.

The Administrative Law Judge ("ALJ") found in favor of Metropolitan and terminated Rambo's benefits. The ALJ determined that Rambo's new job was a "change in conditions" within the meaning of 33 U.S.C. § 922.[2] The Benefits Review Board affirmed. Both the ALJ's and the Board's decisions relied upon *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985), which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement for modification. Neither decision cited any Ninth Circuit cases. However, our cases make clear that only a change in a claimant's *physical* condition can justify an award modification. A change in a claimant's wages, training,

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[2] Section 922 provides for a modification of awards for, among other things, a "change in conditions."

skills, or educational background is insufficient. Accordingly, we reverse the decision of the Benefits Review Board ("BRB").

Analysis

Under our cases, a mere change in a claimant's wages, training, skills, or educational background is not sufficient to meet the "change in conditions" requirement for an award modification. Rather, a party seeking to modify an award must prove that the claimant has undergone a change in his physical condition. *See, e.g., Pillsbury v. Alaska Packers Ass'n*, 85 F.2d 758, 760 (9th Cir. 1936), *rev'd on other grounds*, 301 U.S. 174 (1937) ("The expression 'change in conditions' refers to a *change in the physical condition* of the employee." (emphasis added)).

For example, in *McCormick S.S. Co. v. United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933), we held that a mere change in a claimant's wages – without proof of a change in his physical condition – was not sufficient to satisfy the "change in conditions" requirement of 33 U.S.C. § 922. *See* id. at 86 (rejecting the petition for modification because it was not based upon "*a change in physical condition*," but rather upon the claimant's changed earnings (emphasis added)).

Here, the respondent relies exclusively upon the Fourth Circuit's decision in *Fleetwood*, which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement of 33 U.S.C. § 922. As the *Fleetwood* dissent noted, the Fourth Circuit's rule is in direct conflict with the Ninth Circuit's rule. See id. at 1235 (Warriner, J., dissenting) (noting that "[b]eginning

with the first opinion dealing with the question, [*McCormick,*] handed down in 1933, and continuing thereafter, the courts have uniformly interpreted the term "change in conditions" in [33 U.S.C. § 922] to refer exclusively to a *change in physical condition* of the employee receiving compensation." (emphasis added)). A three-judge panel may not overturn Ninth Circuit precedent, *United States v. Lewis*, 991 F.2d 524, 525 n.1 (9th Cir.), *cert. denied*, 114 S.Ct. 216 (1993).

As the *Fleetwood* dissent points out, *id.*, the Fourth Circuit's rule conflicts with the position taken by the First and Fifth Circuits. *See, e.g., General Dynamics Corp. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor*, 673 F.2d 23, 25 n.6 (1st Cir. 1982) ("Courts uniformly have held that a 'change in conditions' . . . means a change in the employee's *physical* condition, not other conditions." (emphasis in original)); *Burley Welding Works, Inc. v. Lawson*, 141 F.2d 964, 966 (5th Cir. 1944) (citing *McCormick* and *Pillsbury*, and holding that "[i]t has been uniformly held that the term 'change in conditions' . . . means a change in the employee's *physical condition*, and not other conditions" (emphasis added)). Thus, this circuit's precedent is supported by the clear weight of authority.

REVERSED

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN RAMBO, Claimant-Petitioner, v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, Respondents.	No. 92-70783 OWCP No. 18-6945 BRB No. 91-1538 ORDER (Filed Aug. 10, 1994)

Before: REINHARDT and LEAVY, Circuit Judges, and BROWNING,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Leavy have voted to reject the suggestion for rehearing en banc, and Judge Browning has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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*The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.